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No. 06-1646

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GINO GONZAGA RODRIQUEZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent contends that, for purposes of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e) (2000 & Supp. IV 2004), the "maximum term of imprisonment" for a state drug-trafficking offense is the maximum term to which first-time offenders were subject, even for repeat offenders who were subject to a higher maximum. That interpretation accords neither with the text of the ACCA nor with common sense. The ACCA naturally accommodates the possibility that there may be alternative maximum terms of imprisonment for recidivists and non-recidivists. For recidivists, the maximum is the higher term. And if there could be only one maximum term of imprisonment for the offense, it would have to be the highest term that *any* offender could conceivably receive for the offense, not the lower maximum that some subset of offenders could receive. Under respondent's interpretation, a repeat offender's "maximum

term of imprisonment" for the offense would sometimes be less than the term that the offender *actually* received. Respondent offers no adequate justification for such a bizarre and anomalous result.

Respondent contends that the government's interpretation would require federal courts to engage in difficult legal and factual inquiries in order to determine whether a defendant was subject to an enhanced sentence for his prior offense as a recidivist. In most cases, however, it will be clear from the judgment of conviction (or obvious as a matter of law and fact) that the defendant was subject to the requisite heightened maximum. And to the extent that courts applying the ACCA would occasionally have to resolve legal or factual issues in determining whether a defendant was subject to an enhanced sentence as a recidivist, those issues are no different in kind from comparable issues that ACCA courts routinely confront.

Finally, apparently as a fallback argument, respondent suggests that the relevant "maximum term of imprisonment" is the highest term to which the particular defendant was subject under a mandatory state sentencing guidelines scheme. The ACCA's text does not permit that interpretation, however, and Congress cannot be thought to have intended courts to consider potentially intricate offender-specific guidelines calculations in order to identify the maximum term for an "offense." Instead, the relevant "maximum term of imprisonment" for a repeat offender is the highest term that repeat offenders could receive. Because respondent qualifies as a career criminal for purposes of the ACCA under that interpretation, the judgment of the court of appeals should be reversed.

A. The "Maximum Term Of Imprisonment" For A Drug-Trafficking Offense Committed By A Recidivist Takes Into Account Recidivist Enhancements

Although respondent committed his Washington state drug-trafficking offenses as a recidivist, and although Washington imposes heightened maximum terms of imprisonment for recidivist drug offenders, respondent contends (Br. 8-21) that, as to each of his convictions, the "maximum term of imprisonment" for the offense was the highest term to which a hypothetical first-time offender would have been subject. That contention lacks merit.

1. Respondent's interpretation presents two insurmountable textual difficulties.

a. Like the court of appeals, respondent assumes that, under the ACCA, there can be only one "maximum term of imprisonment" for any given offense. See, *e.g.*, Br. 14 (stating the statute "refers to *the* penalty 'prescribed by law' for an 'offense'") (emphasis added). But there is no reason to assume that Congress intended to overlook the pervasive reality in American criminal law that legislatures impose alternative maximum sentences depending on whether an offender is a recidivist. See U.S. Br. 17; *United States* v. *LaBonte*, 520 U.S. 751, 758-759 (1997). Even if Congress had referred only to "the" maximum term of imprisonment for an offense in the ACCA, the statute would naturally be understood to accommodate situations in which a first offense carries one sentence, but a repeat offense carries a harsher one. And for the purpose of determining the maximum sentence for such a repeat offense, "'the maximum term

authorized' for qualifying repeat offenders [would be] the enhanced, not the base, term." *Id.* at 759.[1]

In any event, the ACCA defines a "serious drug offense" as "an offense under State law * * * for which *a* maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii) (emphasis added). That language underscores that there may be *alternative* maximum terms of imprisonment for a given offense: *i.e.*, for recidivists and non-recidivists. That is precisely what Washington law provides for the offense at issue here: the maximum term of imprisonment is five years for first-time offenders, but ten years for repeat offenders. See Wash. Rev. Code §§ 69.50.401 (a)(1)(ii)-(iv), 69.50.408(a) (1994).

Respondent argues that Congress's use of the indefinite article "a" in the phrase "a maximum term of imprisonment" was insignificant, because it would have been "awkward and ungrammatical" for Congress to have defined a "serious drug offense" as "an offense under State law * * * for which *the* maximum term of imprisonment of ten years or more is prescribed by law." Br. 16 n.7. But it would have been neither awkward nor ungrammatical for Congress to defined "serious drug

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[1] In order to qualify as a "violent felony" for purposes of the ACCA, a crime must be "punishable by imprisonment for a term exceeding one year." 18 U.S.C. 924(e)(2)(B). Certain crimes that would otherwise qualify as "violent felon[ies]" carry maximum sentences of one year or less for first offenders, but higher maximum sentences for repeat offenders. See *Logan* v. *United States*, 128 S. Ct. 475, 480 n.2 (2007); *Begay* v. *United States*, No. 06-11543 (to be argued Jan. 15, 2008). In such cases, the only two plausible interpretations are that *all* offenders convicted of the offense have committed qualifying "violent felon[ies]," and that only repeat offenders convicted of the offense have done so. As with the definition of "serious drug offense," the latter approach is more consonant with Congress's underlying purposes in enacting the ACCA.

offense" in a slightly different manner: *viz.*, as "an offense under State law * * * for which *the* maximum term of imprisonment *prescribed by law* is ten years or more." In any event, the language that Congress actually used reinforces the inference that Congress intended to accommodate the nearly universal reality that States provide alternative "maximum terms of imprisonment" for recidivist and non-recidivist drug offenders.[2]

Respondent repeatedly notes (Br. 2, 7, 9, 17-18) that the ACCA lists as predicate offenses only "serious drug offense[s]" (and "violent felon[ies]")—and seem-

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[2] Respondent contends (Br. 14) that, if Congress had intended to accommodate the possibility of alternative "maximum terms of imprisonment," it could have provided that a predicate offense would exist where the defendant was "*an offender* subject to a maximum term of imprisonment of ten years for commission of a drug offense." Such an offender-focused statute, however, would arguably lend itself only to respondent's *fallback* interpretation, not to the government's interpretation, because a defendant who was subject to an offense-specific maximum term of imprisonment of ten years or more, but a guidelines maximum of less than ten years, could plausibly contend that his offense would not qualify as a predicate offense under such a statute. Congress's offense-based language precludes resort to state guidelines schemes that may regulate punishment for offenders within the maximum "prescribed by law." See pp. 20-24, *infra*.

Respondent also contends (Br. 15-17) that Congress could have drafted the statute explicitly to refer to the maximum term of imprisonment for different "categories" of offenders, as it did in the statute at issue in *LaBonte*, *supra*. Respondent does not suggest, however, exactly how such a statute could be worded in this context. And respondent offers no answer to the government's principal submission concerning *LaBonte* itself: *i.e.*, that the Court recognized that a statute could establish alternative "maximum" terms of imprisonment for a single offense, depending on whether the defendant is a first-time or repeat offender. See, *e.g.*, 520 U.S. at 758 (noting that, "[i]n calculating the 'highest' term prescribed for a specific offense, it is not sufficient merely to identify the basic penalty associated with that offense").

ingly concludes that a given offense may qualify as an ACCA predicate offense only on an "all-or-nothing" basis (*i.e.*, either for recidivists and non-recidivists alike or for no one). Respondent's apparent conclusion does not follow from his premise. In defining predicate offenses for purposes of the ACCA, Congress not only specified particular offense conduct (in the case of "serious drug offense[s]," the trafficking of controlled substances), but then narrowed those definitions by setting a triggering maximum term of imprisonment (in the case of "serious drug offense[s]," ten years). By describing those offenses as "serious" drug offenses, Congress may have been referring only to the specified offense conduct, while allowing for the possibility that, by virtue of the existence of alternative maximum terms of imprisonment, an offense could qualify as a predicate offense only for some offenders, but not for others.[3] But in any event, it is perfectly rational to conclude that an offense is more "serious" when the defendant was a repeat offender than when the defendant was not. See, *e.g.*, *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948) (noting that an

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[3] Citing the ACCA's legislative history, respondent contends that the Department of Justice proposed the ten-year triggering maximum "to ensure that the ACCA targeted prior convictions for drug importation or exportation." Br. 9 n.4 (internal quotation marks omitted). That is inaccurate. As the cited legislative history reflects, a Justice Department official instead proposed including a reference to the Controlled Substances Import and Export Act for that purpose (in the definition of "serious drug offense"). See *The Armed Career Criminal Act Amendments: Hearings on S. 2312 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 10 (1986) (statement of Deputy Assistant Attorney General Knapp).

offense committed by a recidivist is an "*aggravated offense* because a repetitive one") (emphasis added).[4]

Respondent likewise errs in arguing (Br. 12-13) that the "categorical" approach of *Taylor* v. *United States*, 495 U.S. 575 (1990), means that only the penalty based on the elements of the offense counts under the ACCA. The categorical approach of *Taylor* does not speak to the identification of the "maximum term of imprisonment" for the offense, and, in any event, recidivist penalties *are* imposed for the underlying offense. See U.S. Br. 23-26.

Respondent suggests (Br. 17) that, under the government's interpretation, "offenses that almost universally are regarded as *less* than serious" would nevertheless qualify as "serious drug offense[s]" under the ACCA. The sole example cited by respondent does not support that proposition. Respondent notes that, under Michigan law, a repeat offender who distributes tablets containing codeine would have committed a "serious drug offense" under the government's interpretation. See Br.

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[4] Respondent suggests that, with regard to "violent felon[ies]," the government's interpretation would "lead to the anomalous result that a *misdemeanor* offense could qualify as a 'violent felony,'" where an offense is classified as a misdemeanor under state law but repeat offenders are subject to a maximum term of imprisonment of more than one year. Br. 19. Respondent overlooks 18 U.S.C. 921(a)(20), which defines the phrase "crime punishable by imprisonment for a term exceeding one year" (for purposes of the definition of a "violent felony") to *exclude* "any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." The ACCA therefore expressly contemplates that, where an offense that otherwise qualifies as a "violent felony" is classified as a misdemeanor but the relevant maximum term of imprisonment exceeds two years, the offense will qualify as an ACCA predicate. See, *e.g.*, *Logan*, 128 S. Ct. at 480 & n.2.

18 n.9; see also Crim. Law Profs. Br. 11-12 (citing similar example under South Dakota law). A *first-time* offender who distributes tablets containing codeine in violation of Michigan law, however, would be subject to a maximum term of imprisonment of seven years; a repeat offender would be subject to a maximum term of 14 years, and an offender with three previous felony convictions would be subject to a maximum term of life. See Mich. Comp. Laws Ann. §§ 333.7401(2)(b)(ii), 333.7413 (2), 769.12(1)(a) (West 2001 & Supp. 2007); cf. 21 U.S.C. 812(c), 841(b)(1)(D) (setting maximum federal penalty for distribution of Schedule III controlled substances, such as mixtures containing codeine, at five years for first-time offenders and ten years for repeat offenders). Given the severity of the penalty even for first-time offenders, the offense at issue in respondent's example is plainly "serious," even if it is true that the offense would qualify as an ACCA predicate offense only for repeat offenders.

More broadly, in order to constitute a "serious drug offense" under the ACCA, a state offense must involve the trafficking of a controlled substance (as defined by federal law). See 18 U.S.C. 924(e)(2)(A)(ii). It is questionable whether *any* offense involving the trafficking of such a substance could be said to be "almost universally * * * regarded as *less* than serious," as respondent contends. Br. 17. Even if it could, however, the ACCA's reliance on the penalties imposed by state law means that States will have some legislative discretion effectively to determine whether such an offense qualifies as an ACCA predicate offense. Cf. NACDL Br. 9 (noting that "Congress, following federalist impulses, simply set

ten years as a mark of general seriousness, and left it to the states to decide when that threshold is satisfied").[5]

Respondent repeatedly suggests that "a court should look to the penalty assigned by the legislature to a conviction for engaging in conduct constituting the elements of the offense." Br. 7; see Br. 10, 21, 46. Where a State exposes repeat offenders to a higher penalty than first-time offenders, however, the higher recidivist penalty is just as much "a penalty assigned by the legislature * * * for engaging in conduct constituting the elements of the offense" as the lower non-recidivist penalty, because recidivism is not an offense element and the recidivist penalty merely constitutes a "stiffened penalty for the latest crime." *Gryger*, 334 U.S. at 732.[6] The analysis is no different simply because the higher recidivist penalty is codified in a discrete statutory provision (as is the case here). Application of the ACCA turns on the relevant maximum term of imprisonment for the offense, not on the details of its codification.

b. Of course, respondent's elaborate effort to read the ACCA as requiring a single "maximum term of imprisonment" for each offense avails respondent of nothing, because, if there must be a *single* maximum, it is clearly the *higher* one for recidivists. Like the court of

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[5] If, for example, Michigan were to provide that the maximum term of imprisonment for the distribution of tablets containing codeine was ten years for *all* offenders, that offense would unquestionably qualify as an ACCA predicate offense, regardless whether the government's or respondent's interpretation of the statute is the correct one.

[6] In support of the contrary proposition, respondent cites (Br. 11) *United States* v. *Doe*, 960 F.2d 221 (1st Cir. 1992) (Breyer, C.J.). *Doe* is obviously inapposite, however, because it involved the question whether the crime of possessing a firearm as a convicted felon constitutes a "violent felony" for purposes of the ACCA. See *id.* at 223-225.

appeals, respondent concludes that the single maximum term is the maximum for first-time offenders. But as a matter of logic, the true maximum term of imprisonment for an offense is necessarily the highest term that *any* offender could conceivably receive—not the highest term that some subset of offenders could receive (even if other offenders could receive a still higher term). In a choice between two possible maximum sentences for the same offense, it would seem difficult to pick the lower one. Cf. *United States* v. *Hernandez*, 79 F.3d 584, 595 (7th Cir. 1996) (noting that "[t]he word 'maximum' naturally connotes the upper limit of a range, or the greatest quantity possible or permissible," and that, "where a statute provides two tiers of punishment, common sense suggests that the maximum falls at the upper limit of the higher of the two tiers").

Respondent concedes (Br. 20-21) that, under his interpretation, a repeat offender's "maximum term of imprisonment" would sometimes be less than the term of imprisonment that the offender actually received. Respondent fails to justify such a bizarre and anomalous result. Instead, respondent merely asserts (Br. 21), without elaboration, that "[t]he sentence imposed on any given defendant is immaterial in making this 'categorical' determination." But if the ACCA truly requires a "categorical" determination—*i.e.*, that any given offense possess only a single "maximum term of imprisonment"—it simply does not follow that the "categorical" maximum is the highest term that a *first-time* offender could conceivably receive, rather than the highest term that *any* offender could conceivably receive. As a matter of common sense, the "maximum term of imprisonment" for the offense, in the case of a repeat offender, must be at least as high as the sentence that the of-

fender actually received for that offense. Certainly, nothing in the ACCA's text suggests otherwise.[7]

2. Respondent's interpretation is inconsistent not only with the text of the ACCA, but also with Congress's underlying purposes in enacting it. As respondent's amici note, enhanced penalties for recidivists are (and have long been) a ubiquitous feature of the criminal justice system. See, *e.g.*, Crim. Law Profs. Br. 7-8. It is hard to imagine that Congress would have wanted to ignore those enhanced penalties in determining the relevant "maximum term of imprisonment" for a defendant's prior offenses. Such an approach would be especially counterintuitive because the ACCA is itself a statute that enhances sentences for recidivists. Neither respondent nor his amici cite anything in the legislative history suggesting that Congress, while imposing its own enhanced recidivist penalties, intended sentencing courts to ignore recidivist penalties imposed for prior offenses.

Respondent contends (Br. 20) only that the government's interpretation is problematic as a policy matter because it would lead to "a sort of perverse bootstrapping," in which a defendant's prior recidivist status would make it easier for the defendant to qualify as a

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[7] Respondent contends (Br. 21) that the government's interpretation would give rise to an anomaly of its own, insofar as the "maximum term of imprisonment" for a repeat offender would frequently be higher than the maximum term of imprisonment to which the offender would be subject under a mandatory state sentencing guidelines scheme. There is nothing anomalous about that result, because the ACCA focuses on maximum terms of imprisonment for the *offense*, not for each particular *offender*. Even under respondent's preferred construction, moreover, the same "anomaly" would frequently occur: for example, where the statutory "maximum term of imprisonment" for a *first-time* offender would be higher than the maximum term of imprisonment to which the offender would be subject under a mandatory guidelines scheme.

career offender under the ACCA. There is nothing unusual, however, about such so-called "double counting," in which a prior offense not only could qualify as a predicate offense itself but could render a subsequent offense a predicate offense as well. For example, California's "three strikes" law, which this Court recently upheld against an Eighth Amendment proportionality challenge, operates in precisely that fashion. See *Ewing* v. *California*, 538 U.S. 11, 16 (2003) (plurality opinion). And a reading of the ACCA that permits such "double counting" is entirely consistent with Congress's overarching policy objective of "increas[ing] the participation of the Federal law enforcement system in efforts to curb armed, habitual drug traffickers and violent criminals." H.R. Rep. No. 849, 99th Cong., 2d Sess. 1 (1986).

3. Finally, respondent contends (Br. 47-49) that his interpretation of the ACCA is supported by the rule of lenity. As a preliminary matter, the rule of lenity has less force where the relevant question is not whether a defendant's primary conduct is criminal, but rather whether a defendant is subject to a longer sentence for indisputably criminal conduct based solely on the legal classification of prior convictions, because the fundamental purposes of the rule are to ensure that defendants have fair warning of the boundaries of criminal conduct and that Congress, not the judiciary, defines criminal liability. See *Crandon* v. *United States*, 494 U.S. 152, 158 (1990).

In any event, to the extent that the rule of lenity has force in this context, it is inapplicable here. The rule of lenity comes into play only when there is a "grievous ambiguity" in the statutory text, such that, "after seizing everything from which aid can be derived, . . . [the Court] can make no more than a guess as to what Con-

gress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted). The ACCA's definition of "serious drug offense" suffers from no such "grievous ambiguity." The most natural reading of that statutory provision is that it accommodates the possibility of alternative maximum terms of imprisonment for recidivists and non-recidivists. The only arguable alternative construction would be that the single "maximum term of imprisonment" for the offense is the maximum that *any* offender could receive. The rule of lenity cannot justify the adoption of an interpretation, such as respondent's preferred construction that the "maximum term of imprisonment" for *all* offenders is the maximum for *first-time* offenders, that the statutory text does not permit. See, *e.g.*, *Salinas* v. *United States*, 522 U.S. 52, 66 (1997).

B. Determining The "Maximum Term Of Imprisonment" For Repeat Offenders Does Not Create Insuperable Practical Difficulties

Relying on this Court's decisions in *Taylor*, *supra*, and *Shepard* v. *United States*, 544 U.S. 13 (2005), respondent contends (Br. 21) that the government's interpretation of the ACCA would require federal courts to "engage in difficult inquiries regarding novel questions of state law and complex factual determinations about long-past proceedings in state courts." Respondent greatly overstates the practical difficulties that would arise under the government's interpretation—and, in any event, those practical difficulties provide an insufficient basis for refusing to afford the text its most natural meaning.

1. For the mine run of potential ACCA predicate offenses, it will be clear from the judgment of conviction

for the predicate offense—or from other comparable judicial records, such as the presentence report or sentencing transcript—that the defendant was subject to the requisite maximum sentence. See J.A. 16, 42, 93. Courts typically need to determine the applicable minimum and maximum before imposing sentence, because, where a defendant is sentenced under a sentencing guidelines scheme, the guidelines range may extend above or below the offense-specific statutory range.[8] Thus, in the federal system, the presentence report ordinarily lists the statutory range alongside the Guidelines range. See, *e.g.*, PSR ¶¶ 119-123, at 18. And in the Washington system, the judgment form itself lists the offense-specific statutory maximum on a line next to the guidelines range. See J.A. 16, 42, 93; NACDL Br. 8. In those cases, federal sentencing courts will find it easy to determine whether a defendant was subject to the qualifying maximum sentence for the prior offense.

In many other cases, it will be obvious, as a matter of law and fact, that the defendant was subject to the requisite maximum sentence. Most obviously, there will be cases in which the length of the sentence itself makes clear that the defendant was sentenced as a recidivist. There will also be cases in which the relevant recidivism statute is easy to apply. For example, the Washington recidivism statute at issue here—which was part of the Uniform Controlled Substances Act, see § 413, 9 U.L.A.

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[8] Under Washington law, for example, a defendant who committed the same offense as respondent—delivery of a Schedule III, IV, or V controlled substance—could have been subject to a presumptive guidelines sentence of up to 84 months, even if the defendant had not committed another drug-trafficking offense (and was therefore subject to the five-year statutory maximum for first-time offenders). See Wash. Rev. Code §§ 9.94A.310, 9.94A.420 (1994).

778-779 (1994), and has been passed in identical form by numerous other States—applies whenever a defendant has a previous conviction "under this chapter or under any statute of the United States or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs." Wash. Rev. Code § 69.50.408(a) (1994). Respondent not only had three convictions for delivery of a Class III-V controlled substance under Washington law (for offenses committed on different dates), see J.A. 14, 40, 91, but also had a 1986 California conviction for being under the influence of controlled substances (specified in the information as cocaine and heroin), see PSR ¶¶ 51-53, at 9; Cal. Health & Safety Code § 11550 (West 2002).[9] Even if the judgments had not reflected the fact that respondent was subject to a ten-year maximum sentence as a repeat offender for each of his three Washington convictions, therefore, it would be clear that respondent was in fact subject to that higher maximum.

2. Respondent contends that there could be cases in which federal courts would be required to resolve disputed issues of law or fact in order to determine whether the defendant was subject to the requisite maximum sentence for his prior offense. With regard to legal issues, respondent cites cases—none of which actually arises in the ACCA context—in which there is a question

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[9] For that reason, it is irrelevant whether any of respondent's Washington convictions was "prior" to another for purposes of the Washington recidivism statute. See Resp. Br. 27 n.11. Notably, the Washington state court that convicted respondent of the drug-trafficking offenses concluded that he was subject to the higher maximum sentence as a repeat offender for *all three* of those convictions—thereby suggesting that the court likewise relied on his 1986 California conviction. See J.A. 16, 42, 93.

whether one conviction is "prior" to another (and therefore constitutes a predicate offense) for purposes of a state recidivism statute. See Br. 25-26. In many of the cases respondent cites, however, state courts merely applied settled legal rules for determining when a conviction is "prior." See, *e.g.*, *Koonsman* v. *State*, 860 P.2d 754, 755-756 (N.M. 1993); *Graham* v. *State*, 435 N.E.2d 560, 561 (Ind. 1982). More generally, to the extent that federal courts would occasionally have to confront issues of state law in determining whether a defendant was subject to the necessary maximum sentence, those issues are no different in kind from other state-law issues that federal courts routinely address in applying the ACCA—such as whether the elements of a state-law offense are sufficient to render the offense a "violent felony," see *Taylor*, 495 U.S. at 600; whether a defendant has received a "conviction" for a predicate offense in state court (as opposed to, for example, a deferred adjudication), see S. Rep. No. 583, 98th Cong., 2d Sess. 7 (1984); and whether a *first-time offender* was subject to the requisite maximum sentence. There is no reason to believe either that cases presenting state-law issues in this context are likely to be common, or that resolution of those issues is likely to be complex.

With regard to factual issues, respondent cites cases—again, none of which actually arises in the ACCA context—in which there is a question whether a conviction from another State would qualify as a conviction for a predicate offense for purposes of a state recidivism statute governing a later offense. See Br. 27-31. Where it is unclear from the judgment of conviction whether the defendant was subject to the requisite maximum sentence, however, the government presumably would bear the burden of proof as to any relevant factual is-

sues: in respondent's example, the government would be required to prove the presence of any fact necessary to render the prior offense a qualifying predicate under the pertinent state law. And where records pertaining to the relevant factual issue are unavailable, the government would be unable to rely on the later offense as an ACCA predicate. In any event, as with cases presenting legal issues, there is no reason to believe either that cases presenting unresolved factual issues in this context are likely to be common, or that resolution of those issues is likely to be complex.[10]

3. Respondent observes (Br. 35-37) that, under the government's interpretation, an offense could sometimes qualify as an ACCA predicate offense even if the state court did not actually apply a higher maximum sentence to the defendant as a repeat offender, on the ground that the higher maximum sentence *could* have been ap-

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[10] Citing *Shepard*, respondent contends (Br. 30) that allowing federal courts to resolve factual issues concerning prior convictions would "raise serious constitutional concerns." Lower courts have consistently held, however, that courts may constitutionally determine not only whether a defendant was previously convicted, but also whether the prior conviction qualifies as a predicate offense for purposes of various federal statutes (including the ACCA). See, *e.g.*, *United States* v. *Morris*, 293 F.3d 1010, 1013 (7th Cir.), cert. denied, 537 U.S. 897 (2002); *United States* v. *Kempis-Bonola*, 287 F.3d 699, 703 (8th Cir.), cert. denied, 537 U.S. 914 (2002). And to the extent that the constitutional-avoidance concerns on which a plurality of the Court relied in *Shepard* are applicable to the resolution of factual issues concerning predicate offenses once removed (*i.e.*, predicate offenses to potential ACCA predicate offenses), those concerns could be addressed simply by applying the "modified" categorical approach of *Taylor* and *Shepard* and limiting federal courts, in resolving those factual issues, to consideration of judgments and other comparable judicial records.

plied.[11] Respondent asserts (Br. 35) that, in that situation, finding an enhanced maximum would "upset[] the balance between federal and state courts" and thereby violate principles of federalism. Such a situation, of course, is not presented here, but in any event that situation does not raise federalism concerns. The ACCA imposes a stiffened penalty on qualifying repeat offenders for a *federal* offense: *viz.*, the offense of possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1). See, *e.g.*, S. Rep. No. 190, 98th Cong., 1st Sess. 8 (1983) (noting, with regard to prior version of the ACCA that would have criminalized possession of a firearm during a robbery or burglary, that "[the ACCA's] punishment of imprisonment for at least fifteen years is based entirely on the present offense, not on the defendant's 'status' as a 'career criminal'"). Just as federal law could validly impose a heightened penalty for a federal offense based on a predicate offense that would not serve as a basis for a heightened penalty for a state-law offense at all, so too can the ACCA impose a heightened penalty for a federal offense based on a predicate offense that *could* serve as a basis for a heightened penalty for a state-law offense, even if it did not in fact do so. Such an interpretation of the ACCA in no way works a "federal intrusion into state criminal adjudications" of the type that would raise structural constitutional concerns. *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000).

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[11] For example, where a state prosecutor failed to provide the requisite notice that he was seeking an enhanced sentence or where the sentencing court had discretion not to apply a recidivism enhancement, an offense could still qualify as an ACCA predicate offense as long as the defendant was *eligible* for the requisite enhancement. See, *e.g.*, *United States* v. *Henton*, 374 F.3d 467, 470 (7th Cir.) (per curiam), cert. denied, 543 U.S. 967 (2004).

4. Respondent's various (and, in the ACCA context, hypothetical) examples of disputed legal and factual issues relating to recidivist enhancements are insufficient to justify respondent's interpretation of the ACCA, which would preclude the government from *ever* showing that a defendant was subject to the requisite maximum sentence for his prior offense by virtue of his status as a repeat offender. At most, those examples would support adoption of an analogous approach to that taken by the Court in *Taylor* and *Shepard*, under which a court would be permitted to resort to judicial records in order to establish whether a defendant was *determined* to be subject to the requisite maximum sentence as a repeat offender. In this case, respondent would unquestionably lose under that approach, since (as the district court noted, see J.A. 165) the judgments for each of his three Washington drug-trafficking convictions plainly indicate that he was subject to the ten-year maximum sentence for repeat offenders. See J.A. 16, 42, 93; see also NACDL Br. 8 (conceding that judgments are "documents that this Court has already held proper to consider" under *Taylor* and *Shepard*).[12]

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[12] Respondent notes (Br. 4-5) that, while he expressly acknowledged in the plea statement for one of his convictions that "[t]he crime with which I am charged carries a maximum sentence of 10 years imprisonment," J.A. 28, the plea statements for the other two convictions left the maximum sentence for the offense blank, apparently inadvertently, see J.A. 54, 105. Each of those two plea statements, however, indicated that respondent was subject to a $20,000 fine, see *ibid.*—a maximum fine that, under Washington law, is applicable only to repeat offenders who are also subject to the heightened ten-year maximum sentence, see Wash. Rev. Code §§ 69.50.401(a)(1)(ii)-(iv), 69.50.408(a) (1994).

C. The "Maximum Term Of Imprisonment" For An Offense Is Not The Maximum Sentence To Which A Particular Offender Was Subject Under A Mandatory State Sentencing Guidelines Scheme

Apparently as a fallback argument, respondent contends (Br. 38-46) that, if statutory maximums for recidivists and non-recidivists are recognized as relevant "maximum term[s] of imprisonment," lower maximums under a mandatory state sentencing guidelines scheme should be recognized as well. That contention—which respondent concededly failed to advance in the courts below—lacks merit.

1. The text of the ACCA does not permit an interpretation under which the relevant "maximum term of imprisonment" is the maximum sentence to which a particular offender was subject under a mandatory state sentencing guidelines scheme. As respondent correctly notes (Br. 7), the ACCA focuses on "a maximum term of imprisonment" *for the underlying offense*. Its language does not invite consideration of individualized "maximum term[s] of imprisonment" for every offender, based on the potentially infinite combinations of facts about an offender's conduct that may give rise to the offender's guidelines range. Although respondent asserts otherwise (Br. 43), sentencing guidelines schemes often set a different "maximum" for each offender; in the federal system, for example, that maximum is determined by the offender's total offense level (which, in turn, depends on the applicability of a variety of adjustments) and criminal history category, and may also be affected by upward or downward departures. See Sentencing Guidelines Ch. 5, Pt. A (sentencing table). Treating a particular offender's guidelines maximum as the rele-

vant "maximum" for purposes of the ACCA would render meaningless the ACCA's reference to "a maximum term of imprisonment" for the offense.

Respondent repeatedly contends (Br. 8, 21, 22, 24, 25, 27, 38, 39, 41, 44, 45) that the government's theory is that the relevant "maximum" is the maximum that a particular offender "actually faced"—and that it necessarily follows that the relevant "maximum" is the maximum to which the offender was subject under an applicable mandatory guidelines scheme. But Congress should not be held to have adopted a case-specific sentencing system in the ACCA, with all of its complexities, simply because Congress naturally would have expected the recidivist-enhanced maximum term to be the relevant "maximum" for a repeat offender. The latter is all that the text of the ACCA contemplates.

2. Respondent cites no evidence from the legislative history suggesting that Congress intended that determinations under guidelines systems would control the "maximum term of imprisonment * * * prescribed by law" to which a defendant was exposed. The absence of any such evidence is unsurprising, because, when Congress passed the ACCA in its current form in 1986, Congress had already provided for the promulgation of federal sentencing guidelines—and, in so doing, indicated that offense-specific statutory maximums remained discrete (and unaffected). See, *e.g.*, 28 U.S.C. 994(r). Moreover, Congress was well aware of the fact that some States had implemented guidelines schemes of their own. See S. Rep. No. 225, 98th Cong., 1st Sess. 61-62 (1983).

More broadly, it is difficult to believe that Congress would have wanted to focus on the maximum sentence to which a particular offender was subject under a manda-

tory guidelines scheme, because such an interpretation would dramatically narrow the ACCA's reach. For example, where a state drug-trafficking offense bore a maximum sentence of ten years for first-time offenders and repeat offenders alike, but where the State at issue had a mandatory sentencing guidelines scheme, the offense would likely qualify as an ACCA predicate offense only for a very small percentage of offenders, because the guidelines maximum for all but the very worst offenders would presumably fall short of the requisite ten-year statutory maximum. Accordingly, no court construing the phrase "maximum term of imprisonment" in the ACCA (or similar phrases elsewhere in the ACCA or in other statutes) has concluded that the relevant "maximum" is "the maximum sentence available in the particular case under the sentencing guidelines," rather than "the statutory maximum sentence for the offense," *United States* v. *Murillo*, 422 F.3d 1152, 1154-1155 (9th Cir. 2005), cert. denied, 547 U.S. 1119 (2006); instead, courts have disagreed only about the relevant *offense-specific* maximum.

3. A regime that required ACCA sentencing courts to determine the maximum sentence for each offender under the applicable sentencing guidelines system would present practical difficulties that would far outstrip those that respondent alleges would be presented by a regime that required a determination of recidivist status alone. To be sure, in many cases, the judgment of conviction would indicate the applicable guidelines sentencing range, just as it would the applicable offense-specific statutory sentencing range. As this Court has noted, however, courts applying mandatory guidelines systems were typically not *required* to increase a given offender's sentence based on aggravating factors—and, as

a result, those courts would not necessarily have memorialized the "maximum" guidelines sentence for which the offender was eligible. See *Blakely* v. *Washington*, 542 U.S. 296, 305 n.8 (2004). And because the factors that go into the calculation of an offender's guidelines range can be numerous and complex, there would be far fewer cases in which it would be obvious to an ACCA sentencing court that the defendant was subject to the requisite maximum sentence, where the judgment (or other comparable judicial records) did not so indicate. In short, there is no basis in the ACCA's text, legislative history, or policy to limit the phrase "maximum term of imprisonment" to the guidelines maximum applicable to a particular offender.

4. Amicus NACDL contends (Br. 3-11) that this Court should effectively reach the same result by holding, first, that respondent's "offense" for ACCA purposes is the offense of delivery of a Schedule III, IV, or V controlled substance *in the absence of aggravating factors*, and, second, that the "maximum term of imprisonment" for that "offense" is the maximum to which an offender was subject in the absence of aggravating factors under Washington's mandatory guidelines scheme. That argument fails for the simple reason that, at the time respondent committed his offense, the Washington State Legislature had defined the relevant offense as delivery of a Schedule III, IV, or V controlled substance—and had treated aggravating factors as sentencing factors to be determined by the court, rather than offense elements to be determined by the jury. See Wash. Rev. Code §§ 9.94A.120(2), 9.94A.390, 69.50.401(a)(1)(ii)-(iv) (1994); see also *Liparota* v. *United States*, 471 U.S. 419, 424 (1985) (explaining that "[t]he definition of the elements of a criminal offense is entrusted to the

legislature"). The maximum term of imprisonment for *that* offense was ten years for repeat offenders such as respondent—even if a repeat offender could actually *receive* a ten-year sentence only in the presence of aggravating factors.

It is true that, in the wake of this Court's decision in *Blakely*, which held that aggravating factors that raise a defendant's maximum sentence under a mandatory state sentencing scheme may no longer constitutionally be determined by a court, many state legislatures (including Washington's) "*Blakely*-ized" their state sentencing schemes by requiring the submission of aggravating factors to the jury. See, *e.g.* Wash. Rev. Code § 9.94A.537(3) (2006). Even for predicate offenses committed *after* those amended sentencing schemes took effect, it is not clear that, for ACCA purposes, the "offense" of delivery of a Schedule III, IV, or V controlled substance under Washington law is distinct from the "offense" of delivery of such a controlled substance plus an aggravating factor (such as occupying a high position in the drug distribution hierarchy, see Wash. Rev. Code § 9.94A.535(3)(e)(iv) (2006)). Washington, for example, retained its statutory penalty ceilings for its drug-trafficking offenses, which constitute potentially available maximum terms of imprisonment for those offenses. But however that issue should be resolved, the predicate offenses in this case took place well before the Court's decision in *Blakely* (and, for that matter, the Court's earlier decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000))—and there is no justification for creating the retroactive legal fiction that aggravating factors were offense elements even *before Blakely* for purposes of defining the relevant "offense" under the ACCA.

D. If Adopted By This Court, The Court Of Appeals' Interpretation Will Have Adverse Consequences For The Application Of The ACCA And Other Statutes

Respondent concedes (Br. 19) that, if his interpretation of the ACCA is adopted, it would exclude from the ACCA's scope not only recidivists who were subject to ten-year maximum sentences as repeat offenders for federal or state drug-trafficking offenses (under the ACCA's definition of a "serious drug offense," see 18 U.S.C. 924(e)(2)(A)(i)-(ii)), but also recidivists who were subject to one-year maximum sentences as repeat offenders for federal or state violent felonies (under the ACCA's definition of a "violent felony," which covers "any crime punishable by imprisonment for a term exceeding one year," 18 U.S.C. 924(e)(2)(B)). See p. 4 n.1, *supra*. That interpretation would substantially narrow the scope of the ACCA, because it stands to reason that many of the individuals who are potentially subject to the ACCA (because they have committed three prior offenses) would have been subject to recidivist enhancements for at least some of those prior offenses.[13] In fact, the same issue has arisen in both of the other ACCA cases that the Court has agreed to hear on the merits thus far this Term. See *Logan* v. *United States*, 128 S. Ct. 475, 480 n.2 (2007); U.S. Br. at 44-45, *Begay* v. *United States*, No. 06-11543 (to be argued Jan. 15, 2008).

Moreover, respondent does not dispute that his interpretation, if adopted by this Court, could have ramifications for the interpretation of a range of other vitally important federal laws. Numerous other provisions im-

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[13] At least 28 States have statutes defining drug-trafficking offenses with maximum sentences of less than ten years for first-time offenders, but ten years or more for repeat offenders. See U.S. Br. 36 n.13.

pose more severe sanctions on individuals who have been convicted of "crimes" (or "offenses") that are "punishable" by "a maximum term of imprisonment" (or "imprisonment") for more than a specified term of years. See, *e.g.*, 18 U.S.C. 922(g)(1) (felon-in-possession statute), 1961(1)(A) (definition of "racketeering activity" under Racketeer Influenced and Corrupt Organizations Act), 3559(c)(2)(F)(ii) (definition of "serious violent felony" in federal "three strikes" statute); 21 U.S.C. 802 (44) (definition of "felony drug offense" in Controlled Substances Act); Guidelines § 4B1.2(a)-(b) (definitions of "crime of violence" and "controlled substance offense" in "career offender" guideline). And the Ninth Circuit—the only court of appeals to have adopted respondent's interpretation—has already used the same approach to exclude recidivist enhancements under still other provisions. See *United States* v. *Corona-Sanchez*, 291 F.3d 1201, 1208-1211 (2002) (en banc) (definition of "aggravated felony" in the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(G)); *United States* v. *Arellano-Torres*, 303 F.3d 1173, 1178 (2002) (definition of "drug trafficking crime" in 18 U.S.C. 924(c)(2)), cert. denied, 358 U.S. 915 (2003). If this Court were to give the Ninth Circuit's interpretation nationwide effect, therefore, it would likely have pernicious consequences outside the ACCA context as well. In all events, that interpretation cannot be squared either with the text of the ACCA or with common sense—which dictates that the "maximum term of imprisonment" for a repeat offender is the maximum that repeat offenders could receive.

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For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

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